IN THE DISTRICT COURT OF THE VIRGIN ISLANDS

DIVISION OF ST. CROIX

ELEANOR ABRAHAM ET AL., Plaintiff(s), v. ST. CROIX RENAISSANCE GROUP, LLLP, Defendant(s).	CIVIL NO. 12-CV-0011 **ACTION FOR DAMAGES** JURY TRIAL DEMANDED

MOTION FOR EXTENSION OF TIME TO FILE PLAINTIFFS' MOTION TO REMAND NUNC PRO TUNC

COME NOW Plaintiffs, by and through undersigned counsel, and respectfully request that the Court grant them an extension of time *nunc pro tunc* and allow them to file their Motion to Remand, on April 11, 2012.

A court may grant a motion to extend time filed after the deadline if the motion shows proof of good cause and if the failure to act timely was the result of excusable neglect. Fed. R. Civ. P. 6(b)(1)(B); *In re Cendant Corp. Prides Litig.*, 233 F.3d 188, 195-96 (3d Cir. 2000). In determining whether there is excusable neglect, the court should consider the following: (1) the prejudice to the nonmovant, (2) the length of the delay and its potential impact on the judicial proceedings, (3) the reason for the delay and whether it was within the reasonable control of the movant, and (4) whether the movant acted in good faith. *Yesudian v. Howard Univ.*, 270 F.3d 969, 971 (D.C. Cir. 2001); *see Pioneer Inv. Servs. Co. v. Brunswick Assocs. L.P.*, 507 U.S. 380, 395 (1993).

Here, the Motion was fully prepared, but needed to be reviewed and finalized by

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Attorney Rohn who unexpectedly got called to a hearing that instead of lasting a few hours was actually a three (3) day hearing that involved many witnesses and exhibits which counsel spent numerous hours preparing for in *Nicholas v. Grapetree Shores*, Civ. No. 2005/119, and *Browne v. Acuren*, Civ. No. 2011/104. No other counsel could review it as it was the Easter holidays as other counsel were on vacation. Plaintiffs request to file their Motion to remand out of time.

There is no prejudice to the movant in allowing the Plaintiffs to file this Motion to Remand late. *See Cooper v. Price, et al.*, 2003 WL 57898 at *2 (E.D. Pa. Jan. 6, 2003) (*Nunc pro tunc* "describes a doctrine that permits acts to be done, after the time they should have been done, with a retroactive effect. Thus, an act *nunc pro tunc* is an entry made now of something actually previously done to have the effect of the former date, but previously omitted through inadvertence or mistake."). *See also Berkery v. U.S. Parole Comm'n*, 992 F. Supp. 777, 778 (E.D. Pa. 1998) (permitting a motion for reconsideration to be filed *nunc pro tunc* where unfair prejudice would otherwise result); a*nd see United States v. Moss*, 522 F. Supp. 1033, 1035 (E.D. Pa. 1981) (holding that the court could *sua sponte* permit a *nunc pro tunc* filing).

WHEREFORE, Plaintiffs respectfully request that the Court grant them an extension of time until April 13, 2012 to file their Motion to Remand on April 12, 2012.

RESPECTFULLY SUBMITTED
LEE J. ROHN AND ASSOCIATES, LLC
Attorneys for Plaintiff(s)

DATED: April 12, 2012

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CERTIFICATE OF SERVICE

THIS IS TO CERTIFY that on April 12, 2012, I electronically filed the foregoing with the Clerk of the court using the CM/ECF system, which will send a notification of such filing (NEF) to the following:

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IN THE DISTRICT COURT OF THE VIRGIN ISLANDS

DIVISION OF ST. CROIX

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PLAINTIFFS' THIRD MOTION TO REMAND FOR LACK OF FEDERAL SUBJECT MATTER JURISDICTION

Plaintiffs, by and through their undersigned Counsel, move to remand this proceeding to the Superior Court of the Virgin Islands on the ground that this Court lacks subject matter jurisdiction over their claims. Defendant St. Croix Renaissance group ("SCRG") improperly removed these proceedings alleging that this is a "mass action" as defined by 28 U.S.C. §1332 (d), the Class Action Fairness Act of 2005 ("CAFA"). *See* **Exh 1** (Def's 2/12/10 Not of Remov w/o Exh), at 4-10. CAFA removal jurisdiction does not attach to a purported "mass action" unless the case satisfies the provisions of **both** 28 U.S.C. §1332 (d) (11) (A) **and** (B). This case does not. The Court lacks CAFA subject matter jurisdiction and removal was improper.

Because this case was not filed as a class action or a purported class action, CAFA does not create **original** jurisdiction. *See* 28 U.S.C. §1332 (d)(1), (2). Further, the case does not meet the express statutory requirements for a "mass action" to be deemed a class action removable under CAFA, and CAFA does not create **removal** jurisdiction. 28 U.S.C.

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§1332 (d)(11). Accordingly, Plaintiffs move for an Order of Remand to the Superior Court of the Virgin Islands. *See* 28 USCS § 1447(c) ("If at any time before final judgment it appears that the district court lacks subject matter jurisdiction, the case shall be remanded.")

In the alternative, Plaintiffs move for permission to conduct jurisdictional discovery.

LEGAL ARGUMENT

I. DEFENDANT BEARS A HEAVY BURDEN ON REMAND

"28 U.S.C. § 1447(c) requires that, in removed cases, if at any time before final judgment it appears that the district court lacks subject matter jurisdiction, the case shall be remanded." *Samuel-Bassett v. KIA Motors Am., Inc*., 357 F.3d 392, 396 (3d Cir. 2004). "The language of this section is mandatory -- once the federal court determines that it lacks jurisdiction, it must remand the case back to the appropriate state court." *Bromwell v. Michigan Mut. Ins. Co.*, 115 F.3d 208, 213 (3d Cir. 1997) (citations omitted).

Federal courts are courts of limited jurisdiction. "It is to be presumed that a cause lies outside this limited jurisdiction, and the burden of establishing the contrary rests upon the party asserting jurisdiction." *Kokkonen v. Guardian Life Ins. Co. of America*, 511 U.S. 375, 377, 114 S. Ct. 1673, 128 L. Ed. 2d 391 (1994) (internal quotations omitted). Thus, "statutes purporting to confer federal jurisdiction are to be construed narrowly, **with ambiguities resolved against a finding of federal jurisdiction**," given the "well-established principles reflecting a reluctance to find federal jurisdiction unless it is clearly

provided ..." by Congress. *ErieNet, Inc. v. Velocity Net, Inc*., 156 F.3d 513, 518 (3d Cir. 1998) (citations omitted) (emphasis added).

Where jurisdiction is allegedly created by CAFA, the Third Circuit "require[s] the party seeking to remove to federal court to demonstrate federal jurisdiction." *Kaufman v. Allstate N.J. Ins. Co.*, 561 F.3d 144, 151 (3d Cir. 2009), *citing Frederico v. Home Depot*, 507 F.3d 188, 193 (3d Cir. 2007); *Morgan v. Ga*y, 471 F.3d 469, 473 (3d Cir. 2006). "[A]t all stages of the litigation ... the burden of showing that the case is properly before the federal court" remains with the removing party. *Brown v. JEVIC*, 575 F.3d 322, 326 (3d Cir. 2009*)*, *citing Packard v. Provident Nat'l Bank*, 994 F.2d 1039, 1045 (3d Cir. 1993). "[I]n order to carry out the Congressional intent to limit jurisdiction in diversity cases, **doubts must be resolved in favor of remand.**" *Samuel-Bassett*, 357 F.3d at 403 (citations omitted) (emphasis added).

II. DEFENDANT HAS NOT SATISFIED ITS HEAVY BURDEN TO OVERCOME THE PRESUMPTION AGAINST FEDERAL JURISDICTION

A. CAFA treats a "mass action" differently from a "class action."

The distinction between a "class action" and a "mass action" under CAFA is an important one when determining whether a court has subject matter jurisdiction. A "class action" is defined under CAFA as "any civil action filed under rule 23 of the Federal Rules of Civil Procedure or similar State statute or rule of judicial procedure authorizing an action to be brought by 1 or more representative persons as a class action." 28 U.S.C. § 1332(d)(1)(B). It is undisputed that this case was not filed as a class action. *See* Doc No.

5-1 (proposed 1st Amend Compl).[1] ***Original jurisdiction*** over class actions is created by sections (2)-(10) of CAFA. 28 U.S.C. §1332 (d) (2)-(10).

In contrast, mass actions are governed by 28 U.S.C. §1332(d)(11). ***Removability jurisdiction*** over "mass actions" is created by a separate subsection, 28 U.S.C. §1332 (d)(11)(A). *See Abrego v. Dow Chem. Co.*, 443 F.3d 676, 681 (9th Cir. 2006) ("On its face, § 1332(d)(2)-(10) vests the district courts with ***original*** jurisdiction over certain class actions ..., but subsection (d)(11)(A) refers to actions '***removable*** under paragraphs (2) through (10)"') (emphasis in original). "This 'mass action' provision, codified at 28 U.S.C. § 1332(d)(11), gives the federal courts jurisdiction over some actions that are substantially similar to class actions, ***but the section limits this jurisdiction to actions that meet specific criteria***." *N.J. Dental Ass'n v. Metro. Life Ins. Co.*, No. 10-2121, 2010 U.S. Dist. LEXIS 99586, at *8 (D.N.J. Sept. 21, 2010) (emphasis supplied). *See also Lowery v. Ala. Power Co*., 483 F.3d 1184, 1199 (11th Cir. 2007) (recognizing that "§ 1332(d)(11)(A) comes with a proviso: a mass action is **only** deemed a class action 'if it otherwise meets the provisions of [§ 1332 (d)(2) through (10)].'"); *Abrego*, 443 F.3d, at 680 n. 6 ("Section 1332(d) imposes a range of requirements for class action jurisdiction, *see* § 1332(d)(2)-(10), ... [and **a] "mass action" must satisfy each of these requirements and processes.**") (emphasis supplied); *Koshiro Kitazato v. Black Diamond Hospitality Invs.*, No. 09-00271, 2009 U.S. Dist. LEXIS 106924, at *15 (D. Hi. Nov. 13, 2009), *citing* 28 U.S.C. §

1 The 1st Amended Complaint was initially filed in the Superior Court of the Virgin Islands on December 9, 2009. Plaintiffs cite to the copy that was filed in this Court as an Exhibit to Plaintiffs' initial Motion to Remand, as Doc. No. 12-3.

1332(d)(11)(A-B) ("Under CAFA, only actions ***qualifying*** as a mass action may be deemed a class action ....") (emphasis in original).

"In interpreting a statute, the Court looks first to the statute's plain meaning and, if the statutory language is clear and unambiguous, the inquiry comes to an end." *Conn. Nat'l Bank v. Germain*, 503 U.S. 249, 253-54, 112 S. Ct. 1146, 117 L. Ed. 2d 391 (1992); *Rosenberg v. XM Ventures*, 274 F.3d 137, 141-42 (3d Cir. 2001). The language of 28 U.S.C. §1332(d) (11) (A) is unambiguous: "'For purposes of this subsection and section 1453, ***a mass action shall be deemed to be a class action removable under paragraphs (2) through (10) if it otherwise meets the provisions of those paragraphs***.'" *Id*. (emphasis added). Pursuant to the unambiguous language of CAFA, a mass action can only be deemed a removable class action in the event that, or on condition that, the mass action meets certain specified provisions. *Dodd v. U.S.*, 545 U.S. 353, 357; 125 S. Ct. 2478; 162 L. Ed. 2d 343 (2005), *citing* Webster's Third New International Dictionary 1124 (1993) ("the definition of 'if' is 'in the event that' or 'on condition that.'") Further, "[w]e 'must presume that [the] legislature says in a statute what it means and means in a statute what it says there.'" *Dodd*, 545 U.S. at 357, *citing Conn. Nat. Ban*, 503 U.S. at 253-254.

Defendant in this case has ignored the crucial distinction under CAFA between class actions and "mass actions." SCRG has acknowledged that it must make a *prima facie* showing of jurisdiction under CAFA in order for the burden to shift to Plaintiffs to demonstrate that some exception applies, but has failed to demonstrate that this case

meets the statutory requirements for removal jurisdiction over a mass action. Establishing CAFA jurisdiction over an alleged "mass action" is a two-part process. *See* 28 U.S.C. § 1332 (d)(11). First, the case must meet the CAFA definition of a "mass action" under Section 1332 (d)(11)(B).

Second, a case satisfying the definition of "mass action" must then "meet the provisions ..." of paragraphs 1332 (d)(2) through (10) in order for CAFA removal jurisdiction to attach. 28 U.S.C. § 1332 (d)(11)(A); *Lowery v. Ala. Power Co*., 483 F.3d, at 1199 (Section 1332 (d)(11)(A) "conditions a ***mass action****'s* treatment as a class action on the ***mass action*** conforming with eight additional statutory provisions, § 1332(d)(2) through (10) 1332 (d)."") (emphasis supplied). By including the requirement that certain provisions must be met in the removal jurisdiction section of CAFA, Congress has clearly stated "a threshold limitation on the statute's scope ..." *Arbaugh v. Y & H Corp.*, 546 U.S. 500, 514, 515; 126 S. Ct. 1235; 163 L. Ed. 2d 1097 (2006) (citations omitted); *CNA v. U.S.*, 535 F.3d 132, 142 (3d Cir. 2008), *citing Arbaugh,* 546 U.S. at 515-16 & n.11 ("To evaluate whether Congress clearly stated that a requirement should count as jurisdictional, we ask whether the requirement appears in or receives mention in the jurisdictional provision of a given statute") (internal citation and quotes omitted).

Defendant SCRG, the party seeking to remove this action to federal court, is required to demonstrate that the conditions set by CAFA for federal removal jurisdiction have been met. *Kaufman*, 561 F.3d at 151 (citation omitted). Defendant has not made the necessary *prima facie* showing of CAFA "mass action" jurisdiction over this case as will be

shown below.

In one of the few cases within the Third Circuit that decided the question of CAFA jurisdiction over a purported mass action, the court found that CAFA jurisdiction over "actions that are substantially similar to class actions ..." is limited to actions that meet the specific criteria laid out in the statute. *N.J. Dental Ass'n*, 2010 U.S. Dist. LEXIS 99586, at *8 (not for publication) ("[I]t appears from the language and structure of CAFA that Congress did not intend that all cases bearing a resemblance to a class action should be removable on the basis of minimal diversity and $5 million in controversy.") The *Dental Ass'n* case failed to "meet the special class action diversity requirements laid out in 28 U.S.C. § 1332(d)," and was remanded. *Id*. at *9. In *Kaufman*, a case filed as a class action, the Third Circuit stated that if the exceptions to jurisdiction were contained in the jurisdictional section of the statute, the burden of proving that the exceptions did not apply would likely remain with the proponent of jurisdiction. 561 F.3d at 153, 154. As shown, the exceptions to CAFA removal jurisdiction are included in the section of CAFA that defines removal jurisdiction, § 1332 (d)(11)(A).

B. This case is expressly excepted from the definition of a "mass action"

This action should not have been removed under CAFA because this action is expressly excepted from the definition of a "mass action." By definition, "the term 'mass action' ***shall not*** include any civil action in which -- (I) all of the claims in the action arise from an event or occurrence in the State in which the action was filed, and that allegedly resulted in injuries in that State ..." Title 28 U.S.C. §1332(d)(11)(B)(ii) (emphasis supplied).

Examination of the proposed 1st Amended Complaint shows that the Plaintiffs expressly allege that every operative incident occurred in St. Croix and caused injury and damages to the Plaintiffs' persons and property in St. Croix. *See* Doc. No. 5-1 **(**1st Am. Compl.) at ¶¶ 466-474.

A recent case from the Southern District of Illinois is instructive. *See Mobley v. Cerro Flow Prods.*, No. 09-697, 2010 U.S. Dist. LEXIS 524, *9, *10 (S.D. Ill. Jan. 5, 2010). The *Mobley* Court remanded a multi-plaintiff suit raising claims of exposure to toxic chemicals on the grounds, *inter alia*, that the claims were excluded from CAFA's definition of a "mass action." *Mobley*, 2010 U.S. Dist. LEXIS 524, at *11, *citing Tanoh v. Dow Chem. Co.,* 561 F.3d 945, 952-56 (9th Cir. 2009) (specifically relying on the fact that "Plaintiffs in this case are suing in Illinois on claims that arose in Illinois" and the wording of §1332(d)(11)(B)(ii)(I), to find that "CAFA jurisdiction in this case is expressly foreclosed by the language of the statute.") The operative complaint in *Mobley* alleged that "Plaintiffs are persons who reside or have resided in St. Clair County, Illinois, and who seek damages for personal injuries and/or property damage due to allegedly improper disposal of toxic chemicals at three locations in and around Sauget, Illinois..." *Mobley*, at *3, *10.

Here, Plaintiffs who reside or have resided in St. Croix seek damages for personal injuries and/or property damage due to improper maintenance, storage and containment of, and/or failure to remove, toxic substances at a single location, the alumina refinery on St. Croix. Doc. 5-1 (1st Am. Compl.) at ¶¶ 466-474, 476-484. In *Mobley*, "[t]he operative complaint in the case asserts claims for personal injuries based on theories of negligence,

strict liability, nuisance, and battery together with claims for property damage based on theories of negligence, nuisance, and trespass." In this case, the operative Complaint sets out causes of action based on, *inter alia*, negligence, strict liability, nuisance, and infliction of emotional distress, together with claims of property damage based on negligence. *Mobley,* 2010 U.S. Dist. LEXIS 524, at *4; Doc. No. 12-3 (1st Amend Compl.) at ¶¶ 2937-2961; Doc. No. 111-2 (3rd Am. Compl.) at ¶¶, 2113-75. Moreover, unlike the claims in *Mobley*, the claims at issue in this suit all arise from one location.

"CAFA expressly excludes from the statutory definition of a 'mass action' any civil case in which 'all of the claims in the action arise from an event or occurrence in the State in which the action was filed, and that allegedly resulted in injuries in that State or in States contiguous to that State[.]'" *Mobley*, 2010 U.S. Dist. LEXIS 524, at *9, *10 *citing* 28 U.S.C. § 1332(d)(11)(B)(ii)(I). Here, the claims of every Plaintiff arise from an event or occurrence in St. Croix and every Plaintiff alleges injuries and damages in St. Croix. Just as it did in *Mobley*, the plain language of 28 U.S.C. § 1332(d)(11)(B)(ii)(I) excludes this case from "mass actions" under CAFA and Plaintiffs move to remand this action back to the Superior Court of the Virgin Islands.

Plaintiffs are the masters of their complaint, and their factual allegations that their "resulting injuries and damages happened in St. Croix" must be accepted as true. The proposed 1st Amended Complaint alleges incidents all occurring in St. Croix: the dust storms, winds, the existence of the red-mud piles at the St. Croix site, the dispersal of the red-mud from the St. Croix site onto the persons and throughout the homes and property of

the Plaintiffs who were living and working in the vicinity of the St. Croix site; and the continuing exposure to toxic contaminants from the site of those Plaintiffs who remain in the vicinity of the site on St. Croix. Doc. 5-1 at ¶¶ 466-474, 476-484.

Judge Bartle's recent decision in *Abednego v. Alcoa, Inc.*, 2011 U.S. Dist. LEXIS 27892, 8-9 (D.V.I. Mar. 17, 2011), involving the exact same type of removal scenario, and similar allegations found that the case must be remanded as it falls squarely within the CAFA mass action exception. *Id.* The Court held:

> In our view, the plain meaning of CAFA's mass action exception encompasses this action. The Third Amended Complaint alleges the occurrence of a release of bauxite, red mud, and asbestos from an alumina refinery in St. Croix as a result of Hurricane Georges on September 21, 1998. Plaintiffs maintain that defendants' negligence from improperly containing these hazardous substances caused them personal injuries and property damage. The release penetrated into the neighborhoods surrounding the refinery on that same island. All injuries alleged in the Third Amended Complaint resulted from personal and property exposure to hazardous substances released on St. Croix as a result of that one hurricane. Despite the fact that a number of the plaintiffs subsequently moved away from the Virgin Islands, their property damages and personal injuries were incurred when on St.Croix

In this case, the Plaintiffs allege that their interests were harmed as a result of acts and omissions occurring in St. Croix. Thus, Plaintiffs' Complaints demonstrate that all their injuries occurred in St. Croix**.** That some 10 percent of the Plaintiffs have moved from St. Croix does not alter that fact. *See Abednego v. Alcoa, Inc.*, 2011 U.S. Dist. LEXIS 27892, 8-9. Assuming as this Court must that Plaintiffs allegations are true, this Court must additionally find that this action is expressly and specifically excluded by the provision of 28 U.S.C. § 1332 (d)(11)(B)(ii), and accordingly remand on this additional ground. *See Abdenego, supra*.

C. CAFA does not confer removal jurisdiction over this uniquely local controversy.

Section §1332 (d)(11)(A) of 28 U.S.C. squarely places on the removing party the burden of establishing that mandatory exceptions do not apply. Defendants have not shown that the provisions of 28 U.S.C.§1332 (d)(2)-(10) have been met or otherwise do not apply, as required by 28 U.S.C. §1332 (d)(11)(A). Section 1332(d)(4)(A) "require[s] a district court to decline jurisdiction when the controversy is uniquely local and does not reach into multiple states." *Kaufman v. Allstate N.J. Ins. Co.*, 561 F.3d 144, 149 (3d Cir. 2009) (filed as a class action). All of the elements of § 1332(d)(4)(A) are present here.

1. More than 2/3's of the Plaintiffs are citizens of the Virgin Islands and all seek significant relief from Defendant

Section 1332(d)(4)(A)(i)(I) requires that more than two-thirds of the plaintiffs be citizens of the U.S. Virgin Islands. Of the 500 plus Plaintiffs in the case, more than 2/3 of them are citizens of St. Croix, U.S. Virgin Islands.

2. All of Plaintiffs' injuries were incurred in the U.S. Virgin Islands as the result of the Defendant's conduct in the Virgin Islands

"The principal injuries provision requires that 'principal injuries resulting from the alleged conduct or any related conduct of each defendant were incurred in the State in which the action was originally filed.'" *Kaufman*, 561 F.3d at 152, *citing* 28 U.S.C. § 1332(d)(4)(A)(i)(III). In this case, the gravamen of Plaintiffs' Complaint is that they have suffered, and/or continue to suffer, injuries and damages caused by the failure of Defendant to properly store and contain toxic substances at the its facility in St. Croix, U.S.

Virgin Islands, including bauxite, bauxite residue or red mud, asbestos, coal dust, and other particulates. Plaintiffs allege that they continue to be exposed to those substances from the St. Croix site to date. *See* citations to the proposed 1st Amended Complaint, above.

Conclusion

Defendants have failed to meet their burden of showing that the elements of §1332(d)(4)(A) do not apply. Removal was improper because this case does not meet the provisions of paragraphs (2) through (10) of ¶ 1332 (d). 28 U.S.C. § 1332(d)(11)(A). This matter must be remanded.

WHEREFORE Plaintiffs submit that the relevant provisions of CAFA, 28 U.S.C. §1332(d)(11)(A) & (B), mandate that this cause be remanded to the Superior Court of the Virgin Islands. Plaintiffs filed their Complaint in the Virgin Islands Court. The sole basis asserted for federal jurisdiction is CAFA. An analysis of the requirements for CAFA removal jurisdiction shows that it is not present here.

RESPECTFULLY SUBMITTED
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DATED: April 12, 2012

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CERTIFICATE OF SERVICE

THIS IS TO CERTIFY that on April 12, 2012, I electronically filed the foregoing with the Clerk of the court using the CM/ECF system, which will send a notification of such filing (NEF) to the following:

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IN THE DISTRICT COURT OF THE VIRGIN ISLANDS

DIVISION OF ST. CROIX

ELEANOR ABRAHAM et al., Plaintiff(s), v. ST. CROIX RENAISSANCE GROUP, LLLP, Defendant(s).	CIVIL NO. 12-CV-0011 **ACTION FOR DAMAGES** JURY TRIAL DEMANDED

ORDER

THIS MATTER having come before the Court on Plaintiffs' Third Motion To Remand For Lack Of Federal Subject Matter Jurisdiction and the Court having been advised in it premises, it is;

ORDERED that Plaintiff's Motion is **GRANTED**, and further;

ORDERED that this matter is **REMANDED** to the Superior Court.

SO ORDERED this _____ day of _____ 2012.

_____
Judge of the District Court

DISTRICT COURT OF THE VIRGIN ISLANDS
DIVISION OF ST. CROIX

Eleanor Abraham, *et al.*, Plaintiffs, v. **St. Croix Renaissance Group, LLLP,** Defendant.	**CIVIL NO.** 12-11 ACTION FOR DAMAGES JURY TRIAL DEMANDED

DEFENDANT ST. CROIX RENAISSANCE GROUP L.L.L.P.'S NOTICE OF REMOVAL OF A MASS ACTION UNDER 28 U.S.C. 1332(d)

COMES NOW Defendant, St. Croix Renaissance Group, L.L.L.P. ("SCRG") and gives notice pursuant to the *Class Action Fairness Act of 2005* ("CAFA") 28 U.S.C. 1442(d) and *28 U.S.C. 1441* -- of the removal of a mass civil action.

I. Introduction

More than 500 individual Plaintiffs domiciled in various jurisdictions brought this action in the Superior Court of the U.S. Virgin Islands: *Abraham v. St. Croix Renaissance Group, LLLP,* CIVIL NO. SX-11 CV-550. *See* Complaint, attached as **Exhibit A,** and Summons attached as **Exhibit B.** Defendant has not answered, filing only a motion for more definite statement and to sever, attached as **Exhibit C.** There are no other pleadings before the Superior Court.

Service of the Complaint on defendant SCRG occurred less than thirty (30) days prior to the filing of this notice of removal.

EXHIBIT 1

Federal jurisdiction exists for "mass actions" pursuant to the *Class Action Fairness Act of 2005* -- as those requirements of CAFA were codified within *42 U.S.C. § 1332(d)*. A mass action requires that there be 100 or more plaintiffs, common questions of law or fact, and that it not be a class action certified under Federal Rule of Civil Procedure 23. *Cappuccitti v. DirecTV, Inc.* 611 F.3d 1252, 1255 (11th Cir. 2010). Plaintiffs must meet several requirements for CAFA jurisdiction, such as a $5,000,000 aggregate amount in controversy and minimal diversity -- and must not fall within certain, delineated exceptions.[1]

"Congress's goal[] in enacting CAFA [was] to place more [statutorily delineated] actions in federal court by lifting barriers to their removal (which would result in most published CAFA cases being heard in a removal posture)." *Cappuccitti* at 611 F.3d 1255.

[1] In general jurisdictional statutes must be narrowly construed. However CAFA's express, unique stated purpose is to "restore the intent of the framers" by extending federal court jurisdiction over "interstate cases of national importance under diversity jurisdiction." *See* CAFA, Pub. L. No. 109-2, § 2, 119 Stat. 4, 4-5 (2005). **Congress intended the *exceptions* to CAFA to be narrowly construed, "with all doubts resolved 'in favor of exercising jurisdiction over the case.'"** *Evans v. Walter Indus., Inc.*, 449 F.3d 1159, 1163 (11th Cir. 2006) (emphasis added) (quoting S. Rep. 109-14, at 42 (2005), as reprinted in 2005 U.S.C.C.A.N. 3, 40). Once a defendant makes a *prima facie* showing of jurisdiction under CAFA, **the burden shifts to the plaintiff to demonstrate that some exception might apply.** *See Kaufman v. Allstate New Jersey Ins. Co.*, 561 F.3d 144, 153 (3d Cir. 2009) ("*Kaufman I*") (burden for establishing applicability of exceptions to CAFA falls on party seeking remand). This burden shifting applies both to the local controversy exception and to the exceptions to the mass action provision. *See Lowery v. Honeywell Int'l, Inc.*, 460 F. Supp. 2d 1288, 1301 (N.D. Ala. 2006) (plaintiffs have burden of proof for local controversy and mass action exceptions).

II. Applicable Law

The CAFA provisions of section 1332 provide:

d(11) **(A)** For purposes of this subsection and section 1453, a mass action shall be *deemed* to be a class action removable under paragraphs (2) through (10) if it otherwise meets the provisions of those paragraphs.

(B) **(i)** As used in subparagraph (A), the term "mass action" means any civil action (except a civil action within the scope of section 1711(2)) in which monetary relief claims of 100 or more persons are proposed to be tried jointly on the ground that the plaintiffs' claims involve common questions of law or fact, except that jurisdiction shall exist only over those plaintiffs whose claims in a mass action satisfy the jurisdictional amount requirements under subsection (a).

(ii) As used in subparagraph (A), the term "mass action" shall not include any civil action in which--

(I) all of the claims in the action arise from an event or occurrence in the State in which the action was filed, and that allegedly resulted in injuries in that State or in States contiguous to that State;

(II) the claims are joined upon motion of a defendant;

(III) all of the claims in the action are asserted on behalf of the general public (and not on behalf of individual claimants or members of a purported class) pursuant to a State statute specifically authorizing such action; or

(IV) the claims have been consolidated or coordinated solely for pretrial proceedings.

* * * *

(D) The limitations periods on any claims asserted in a mass action that is removed to Federal court pursuant to this subsection shall be deemed tolled during the period that the action is pending in Federal court.

(e) The word "States", as used in this section, includes the Territories, the District of Columbia, and the Commonwealth of Puerto Rico.

III. Argument

A. The Elements of CAFA are Met

This action meets the requirements set forth in the statute in that, with regard to the causes herein[2]:

A. "monetary relief claims" are being made by

B. "100 or more persons" and are

C. "proposed to be tried jointly"

D. "on the ground that the plaintiffs' claims involve common questions of law or fact" and

E. the "plaintiffs. . .claims. . .satisfy the jurisdictional amount requirements under subsection (a) in that each claim has a value that exceeds $75,000."

F. not "all of the claims in the action arise from *an event or occurrence*[3] in the State in which the action was filed, and that allegedly *resulted in*

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[2] SCRG notes that:

(II) the claims are [not] joined upon motion of a defendant;

(III) all of the claims in the action are [not] asserted on behalf of the general public (and not on behalf of individual claimants or members of a purported class) pursuant to a State statute specifically authorizing such action; or

(IV) the claims have [not] been consolidated or coordinated solely for pretrial proceedings.

and that:

(I) to cases [have not been] certified pursuant to rule 23 of the Federal Rules of Civil Procedure; or

(II) if plaintiffs [do not] propose that the action proceed as a class action pursuant to rule 23 of the Federal Rules of Civil Procedure.

injuries in that State or in States contiguous to that State" as (1) this is not a single event or occurrence such as the Court noted was the case in *Abednego v. Alcoa Inc.,* 2011 Westlaw 941569 (D.V.I. March 17, 2011)(emphasis added), and in any case, (2) many of the plaintiffs are now in other jurisdictions where the injuries are allegedly occurring.

D. For the purposes of CAFA, "an unincorporated association shall be deemed to be a citizen of the State where it has its principal place of business and the State under whose laws it is organized." 28 U.S.C. (d)(10). SCRG is a citizen of (1) its state of incorporation (Delaware) and (2) its "principal place of business," which is Massachusetts -- pursuant to the "nerve center" test set forth in *Hertz Corp. v. Friend*, 130 S.Ct. 1181 (2010). Plaintiffs are domiciled in the U.S. Virgin Islands, non-contiguous states and other countries.

B. Related Disputes Shed Light on the Individual Amounts in Controversy

Plaintiff's counsel and various of the plaintiffs have been involved in other, longstanding litigation of intimately related claims involving many of the same plaintiffs going back as far as 1999. *See e.g. Henry v. St. Croix Alumina, LLC*, 2000 U.S. Dist. LEXIS 13102, *8 (D.V.I. Aug. 7, 2000) (along with subsequent related actions "*Henry*"). During that period various combinations of plaintiffs' counsel and hundreds of persons

[3] One series of the plaintiffs' claims stems from "red mud" which was left on the property by alumina refining operators of the Site prior to SCRG's ownership. Another, series of claims relates to another, totally unrelated, source and circumstances -- those claims arise from (non-red mud) asbestos which was only coincidentally present in the structure/construction of the plant facility. Such asbestos was not a byproduct of the "Bayer Process" used in the refining of bauxite ore into alumina, and had nothing to do with the industrial disposal of a waste byproduct.

(and experts) have made numerous representations and claims about the facts[4] -- and amounts -- at issue.

In *Abednego v. St. Croix Alumina LLC et al.*, Civ. No. 1:10-cv-00009, plaintiff could not dispute the $5,000,000 collective amount[5], but did contest the $75,000 per plaintiff amount.[6] *See e.g.* Defendants' Response in Opposition to Plaintiffs' Third Motion to Remand, at D.E. 128, page 7. As noted in that Opposition at 7-10:

> In *Frederico v. Home Depot*, 507 F.3d 188 (3d Cir. 2007), the Third Circuit unified several lines of cases to clarify the test for determining whether the jurisdictional amount is satisfied. The Third Circuit recognized that there are two types of cases, to which different standards apply. In the first, "where the plaintiff's complaint specifically (and not impliedly) and precisely (and not inferentially) states that the amount sought in a class action diversity complaint" will not exceed the jurisdictional minimum, "'the party wishing to establish subject matter jurisdiction has the burden to prove by a legal certainty that the amount in controversy exceeds the statutory threshold.'" *Id.* at 196 (quoting *Morgan v. Gay*, 471 F.3d 469, 471

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[4] For example, in the *Abednego* case (1:10-cv-00009 at D.E. 126), when it was convenient to do so, plaintiffs alleged the direct opposite of what is alleged here:

> When they sold the site to SCRG, Alcoa and SCA left behind bauxite, red mud, asbestos, coal dust, and other particulates **and concealed from SCRG** and Plaintiffs **the true nature of the toxic materials**. Doc. No. 12-3, at ¶ 2924-2926; 111-2, at ¶¶ 2083-87, 2091-94.

[5] In any case, this would be less than $10,000 per plaintiff due to the more than 500 plaintiffs here. In *Abednego* the Court noted that "This lawsuit meets many of the criteria of a mass action. It contains claims by more than 100 persons whose claims involve common questions of law and fact and whose claims in the aggregate exceed $5 million exclusive of interest and costs." See 28 U.S.C. § 1332(2). [1:10-cv-00009, D.E. 133 at 3].

[6] Although Plaintiffs' complaint is extremely confusing (persons listed in the caption are not in the body and *vice versa*) it appears that approximately 80% of the plaintiffs in the instant case are plaintiffs in *Abednego*. In turn, many of "the same individuals [plaintiffs in Abednego] sought essentially the same relief for essentially the same alleged injuries in Henry. (*See* Third Am. Compl., ¶ 2108 ("Plaintiffs herein are former members of the original class in *Henry*. . . .").) *Id.* at 11.

(3d Cir. 2006)). This is commonly referred to as the *Morgan* standard. In the second type of case, **where the plaintiff has *not* disclaimed recovery above the jurisdictional minimum, jurisdiction exists unless "it appears to a legal certainty that the plaintiff *cannot* recover the jurisdictional amount."** *Raspa v. Home Depot*, 533 F. Supp. 2d 514, 522 (D.N.J. 2007) (emphasis added) (citing *Samuel- Bassett v. Kia Motors America, Inc.*, 357 F.3d 392 (3d Cir. 2004)). This is commonly referred to as **the *Samuel-Bassett* standard.**

This case must be decided under the *Samuel-Bassett* standard, as Plaintiffs have not disclaimed recovery above the jurisdictional minimum or stipulated that they would not accept an award of damages in excess of that figure. *See, e.g., Lohr v. United Fin. Cas. Co.*, 2009 U.S. Dist. LEXIS 75388, *11 (W.D. Pa. Aug. 25, 2009) (citing *Frederico*, 507 F.3d at 196-97) ("Because Plaintiffs have not explicitly limited the damages sought to an amount less than $5,000,000, we conclude this case does not fall into the scope of *Morgan*, but rather *Samuel-Bassett*."); *Lorah v. Suntrust Mortgage, Inc.*, 2009 U.S. Dist. LEXIS 12318, *14 (E.D. Pa. Feb. 17, 2009). Instead, they have merely stated that "they reasonably believe their individual damages do not exceed $75,000.00."2 (Third Am. Compl., ¶ 2.) Courts analyzing similar language have held that such unsupported, equivocal allegations regarding plaintiffs' subjective belief – here, purportedly held universally by each of the thousands of Plaintiffs – are insufficient to impose on defendants a burden of proving to a legal certainty that a plaintiff could recover more than the jurisdictional minimum. For instance, in *Lorah*, while the class representatives did

> specifically and precisely expressly limit their individual damages to below $75,000, they do not state that the class damages are below five million dollars. Rather, they state, "there is no CAFA jurisdiction . . . because it is not certain or likely that more than 100 persons will opt-in to the class or that the aggregate amount in dispute in this opt-in class will exceed the five million dollar requirement of CAFA." The Court finds that ***the wording of the Lorahs' class action complaint is sufficiently equivocal*** so as to make the instant case subject to *Samuel-Bassett* standard rather than the *Morgan* standard.

2009 U.S. Dist. LEXIS 12318 at *13-14 (emphasis added, internal citations omitted, ellipses in original) (citing *Samuel-Bassett*, 357 F.3d 392; *Morgan*, 471 F.3d 469). *See also Salce v. First Student, Inc.*, 2009 U.S. Dist. LEXIS 94589, *5-6 (D.N.J. Oct. 8, 2009) (statement that plaintiff "would likely accept a settlement offer at or below $75,000 in support of

> the argument that the amount in controversy will not exceed $75,000" did not permit application of *Morgan*).
>
> * * * *
>
> While Plaintiffs ask the Court to apply the higher standard of *Morgan*, they seek to avoid having the Court do so at the expense of their potential recovery. But *Frederico* is intended to proscribe exactly that sort of double dealing. Because Plaintiffs have not "specifically (and not impliedly) and precisely (and not inferentially)" limited their recovery, but instead have made vague, non-binding statements about their subjective beliefs of the value of their claims, the *Morgan* standard is inapplicable. Instead, the *Samuel-Bassett* standard applies, and Defendants need only show by a preponderance of evidence that it is not a legal certainty that Plaintiffs will recover less than the jurisdictional minimums. *See Frederico*, 507 F.3d at 198 (to the extent that a dispute exists regarding the facts relevant to jurisdiction, a "preponderance of the evidence standard [is] appropriate. Once the findings of fact have been made, the court may determine whether [the] 'legal certainty' test for jurisdiction has been met") (citing *McNutt v. General Motors Acceptance Corp. of Indiana*, 298 U.S. 178 (1936)).

Here Plaintiffs have claimed exposure to both red dust and also to structural asbestos completely unrelated to the Bayer Process. The complaint recites extensive damages from two entirely independent sources -- and punitive damages, alleging:

> 482. As a result of Defendant's conduct, plaintiffs suffered and continue to suffer physical injuries, medical expenses, damage to their properties and possessions, loss of income, loss of capacity to earn income, mental anguish, pain and suffering and loss of enjoyment of life, a propensity for additional medical illness, and â reasonable fear of contracting illness in the future, all of which are expected to continue into the foreseeable future.
>
> 483. To this date, Defendant is continuing to expose plaintiffs to red dust, bauxite, asbestos and other particulates and hazardous substances, Defendants' conduct is also continuing to prevent plaintiffs from freely enjoying their properties.

In the *Henry* case(s) individuals sought relief for lesser alleged injuries over a far smaller time period. However, as has been noted in the related cases:

> Plaintiffs' counsel represented to this Court during a telephonic conference on September 12, 2008, that she expected to be able to recover $150,000 not only for each class representative in *Henry*, but also for every Rule 23(b)(3) class member – that is to say, Plaintiffs. *See* Declaration of Bernard C. Pattie, Esq., ¶ 8 ("Pattie Dec.")[7], attached as Exhibit 1. Plaintiffs' counsel stated that this would be her demand even if all of her key experts were struck (as they eventually were).

See e.g. Defendants' Response in Opposition to Plaintiffs' Third Motion to Remand at D.E. 128, page 18. This was a discussion with the Court -- definitely **not** a settlement discussion between the parties.[8] Moreover, although the experts were later struck -- plaintiff submitted averments as the statements of her clients containing amounts in excess of $75,000 each -- which are probative under the *Samuel-Bassett* standard.

In addition, in determining the amount in controversy, the Court must also consider "the value of the right sought to be protected by the injunctive relief." *Byrd v. Corestates Bank, N.A.*, 39 F.3d 61, 65 (3d Cir. 1994) as well as requests for punitive damages. *See Frederico*, 507 F.3d at 198-99 (citing *Golden v. Golden*, 382 F.3d 348, 356 (3d Cir. 2004)).

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[7] That Pattie Declaration is incorporated by reference herein.

[8] *Id.* at 12:

> [T]he statements were not made during "settlement negotiations," but rather during a status conference with this Court. Second, courts have repeatedly held that even statements made in the settlement context can be used to establish the amount in controversy for jurisdiction purposes. *See, e.g., McPhail v. Deere & Co.*, 528 F.3d 947, 956 (10th Cir. 2008) ("a plaintiff's proposed settlement amount is relevant evidence of the amount in controversy," and is admissible for that purpose under Fed. R. Evid. 408); *Rising-Moore v. Red Roof Inns, Inc.*, 435 F.3d 813, 816 (7th Cir. 2006) (same); *Cohn v. Petsmart, Inc.*, 281 F.3d 837, 840 n.3 (9th Cir. 2002) ("reject[ing] the argument that Fed. R. Evid. 408 prohibits the use of settlement offers in determining the amount in controversy").

Finally, it should be noted that Plaintiffs' counsel and many of the plaintiffs themselves are now well-educated regarding the concept that plaintiffs are "masters of their own complaint." The $75,000 amount could have been summarily pled, but was not. This was clearly intentional -- because plaintiffs seek, and do not wish to be limited to a lesser amount than $75,000. While understandable, this *choice* results in the application of the Samuel-Bassett standard. Thus, Defendants have the right to rely the plaintiffs calculated decision not to plead the $75,000 amount, the prior statements of plaintiffs through counsel and the asserted calculations of plaintiffs' own experts.

A copy of this Notice will be filed with the Clerk of the Superior Court after filing with this Court.

Dated: February 2, 2012

/s/
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CERTIFICATE OF SERVICE

I hereby certify that on this 2nd day of February, 2012, I filed the foregoing with the Clerk of the Court, and hand-delivered said filing to the following:

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1101 King St.
Christiansted, VI 00820
Counsel for the Plaintiffs

/s/
Joel H. Holt, Esq.

Notices

1:12-cv-00011 Abraham, et al.. v. St. Croix Renaissance Group, L.L.L.P.

District Court of the Virgin Islands

District of the Virgin Islands

Notice of Electronic Filing

The following transaction was entered by Holt, Joel on 2/2/2012 at 10:04 AM AST and filed on 2/2/2012

Case Name: Abraham, et al.. v. St. Croix Renaissance Group, L.L.L.P.
Case Number: 1:12-cv-00011
Filer: St. Croix Renaissance Group, L.L.L.P.
Document Number: 1

Docket Text:
NOTICE OF REMOVAL by Defendant St. Croix Renaissance Group, L.L.L.P. from Superior Court of the Virgins Islands, case number 11 - CV - 550. (Filing fee $ 350) (Attachments: # (1) Exhibit A, # (2) Exhibit B, # (3) Exhibit C) (Holt, Joel)

1:12-cv-00011 Notice has been electronically mailed to:

1:12-cv-00011 Notice will be delivered by other means to:

Eleanor Abraham, et al..
1101 King St.
Christiansted, VI 00820

The following document(s) are associated with this transaction:

Document description: Main Document
Original filename:n/a
Electronic document Stamp:
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Document description: Exhibit A
Original filename:n/a
Electronic document Stamp:
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Document description: Exhibit B
Original filename:n/a
Electronic document Stamp:
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Document description: Exhibit C
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IN THE SUPERIOR COURT OF THE VIRGIN ISLANDS

DIVISION OF ST. CROIX

ELEANOR ABRAHAM ET AL., Plaintiff(s), v. ST. CROIX RENAISSANCE GROUP, LLLP, Defendant(s).	CIVIL NO. 550/11 **ACTION FOR DAMAGES** JURY TRIAL DEMANDED

ORDER

THIS MATTER having come before the Court on Plaintiffs' Motion for Extension of Time to File Opposition to Motion to Dismiss *Nunc Pro Tunc*, and the Court having been advised in it premises, it is;

ORDERED that Plaintiff's Motion is **GRANTED**,

SO ORDERED this _____ day of _____ 2012.

_____
Judge of the District Court